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Supreme Court of the United States

DONALD RUMSFELD, *et al.*,
Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR *AMICUS CURIAE* THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN SUPPORT OF RESPONDENTS

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The American Association of University Professors (AAUP) respectfully submits this brief as *amicus curiae* in support of Respondents.[1] *Amicus* urges this Court to affirm the judgment of the Court of Appeals for the Third Circuit.

INTEREST OF *AMICUS CURIAE*

The AAUP is an organization of approximately 45,000 university faculty members and research scholars in every academic discipline, including law, dedicated to advancing the values of higher education. Founded in 1915, the AAUP is committed to the defense of academic freedom. The AAUP has participated as *amicus curiae* before this Court in numerous cases involving constitutional issues in higher education. *See, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

One of the AAUP's principal tasks is the formulation of national standards for the protection of academic freedom. The AAUP's *1915 Declaration of Principles*, issued in the Association's founding year, is the nation's first and most sustained statement on academic freedom. AAUP, "General Report of the Committee on Academic Freedom and Tenure (1915)," AAUP POLICY DOCUMENTS & REPORTS 291 (9th ed., 2001) ("1915 Declaration"). The 1915 Declaration provides for "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action." *Id.* at 292.

The *1940 Statement of Principles on Academic Freedom and Tenure*, developed by the AAUP and the Association of

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[1] The parties have consented to the filing of this brief, pursuant to Rule 37, and their letters of consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *Amicus* states that no counsel for either party authored this brief in whole or in part, and no person or entity, other than *Amicus*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

American Colleges (now the Association of American Colleges and Universities), is the nation's most widely accepted description of the basic attributes of academic freedom and tenure. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS, *supra*, at 3 ("1940 Statement"). It has been endorsed by over 190 professional organizations and learned societies, and has been acknowledged by this Court. *See Bd. of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681–82 (1971).

The 1940 Statement recognizes the importance of academic freedom both to individual faculty members' research, scholarship and teaching, and to the collective faculty governance they engage in as "citizens, members of a learned profession, and officers of an educational institution." *1940 Statement*, *supra*, at 4. As the AAUP's statement *On the Relationship of Faculty Governance to Academic Freedom* notes, "sound governance practice and the exercise of academic freedom are closely connected, arguably inextricably linked," and "the faculty should have primary authority over decisions about such matters [as] . . . the maintenance of a suitable environment for learning. . . ." AAUP, *On the Relationship of Faculty Governance to Academic Freedom*, AAUP POLICY DOCUMENTS, *supra*, at 224, 225 & 227 ("Faculty Governance").

Another of the AAUP's core commitments, expressed in its 1976 policy statement *On Discrimination*, is to protect against discrimination within universities on any "basis not demonstrably related to the job function involved," including discrimination on the basis of sexual orientation. AAUP, *On Discrimination* (1976), AAUP POLICY DOCUMENTS, *supra*, at 185 ("On Discrimination").

This case implicates the AAUP's interest in defending the academic freedom of university faculties and faculty members to be free from inappropriate government interference in

their teaching, research, and collective educational policy-making. It also implicates the AAUP's interest in opposing unjustified discrimination in the university setting on grounds, like sexual orientation, that are unrelated to academic merit. The AAUP offers this brief *amicus curiae* to explain why the First Amendment interests that Respondents defend here are of special importance to university faculties and faculty members, and how the Solomon Amendment intrudes upon vital freedoms of faculty expression and university self-governance.

SUMMARY OF ARGUMENT

The issue in this case is whether the First Amendment permits the federal government to condition the entire flow of federal funding to universities for teaching and research on the requirement that every "subelement" within the university give recruiters from the United States military the same access to its career placement program as it gives to other employers. Many law schools have sought to exclude military employers from those programs because the United States military discriminates against student recruits on the basis of sexual orientation, and the schools' faculties have adopted academic nondiscrimination policies that deem students' sexual orientation irrelevant to their merit or fitness for postgraduate employment. Congress enacted the challenged Solomon Amendment in order to "send a message over the wall of the ivory tower of higher education" to "colleges and universities . . . that their starry-eyed idealism comes with a price." 140 Cong. Rec. H3863 (daily ed. May 23, 1994) (Rep. Pombo).

By prohibiting all federal funding to an entire university if any of its subelements enforces a nondiscrimination policy against military recruiters, the Solomon Amendment directly interferes with academic freedom long protected by the First Amendment. Academic freedom extends beyond teaching and research narrowly understood. It also includes faculty

policies setting the criteria under which universities admit and evaluate students, and the standards and methods that faculties bring to bear to shape the educational environment outside the classroom, including by modeling and instilling professional values that students will carry into postgraduate employment. Law school faculties' adoption and enforcement of nondiscrimination policies represent the exercise of academic self-governance and expertise. *See* Part I.

The government argues that the Solomon Amendment does not aim at speech but rather at the instrumental goal of securing the military's access to college and university students in order to staff the armed forces. *See* Pet. Br. at 15–16, 42. The government claims also that the Solomon Amendment is merely a permissible exercise of Congress's discretion under the Spending Clause, and that universities are always free to give up the nearly $35 billion they now receive annually in federal funding. *See* Pet. Br. at 41 ("[T]he recourse for a person who does not wish to be bound by a funding condition is to decline federal assistance."). Both claims are incorrect.

The Solomon Amendment, as currently amended and applied, does not aim at the functional goal of recruiting students but rather has the impermissible purpose of suppressing faculties' message that discrimination against gay students in recruiting violates academic merit and nondiscrimination standards. This purpose is what animated the law's amendment to require "*equal* access" for military employers, rather than simply the "access" the law required when first enacted.

As initially applied, the Solomon Amendment permitted law schools that excluded military recruiters from their *official* career placement programs to have military recruiters meet with students by other means, so long as these means were adequate to ensure access. The record contains no evidence that the function of military recruiting suffered under the alternative arrangements offered by law schools.

But in 2001, the military changed its interpretation of the Solomon Amendment and adopted an informal policy requiring *equal* access. In 2004, Congress codified that change, so that now the military must have access "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer. . . ." 10 U.S.C. § 983(b) (2005).

The sole purpose of the military's equal-access requirement was to prevent law schools from using alternative recruiting arrangements to convey their view that the military's discrimination is improper. As one military recruiter revealingly summarized, "singling out military recruiters" for any different access, no matter how effective, "sends the *message* that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations" included in career services programs. JA 132 (emphasis added). Interfering with faculties' message in order to send a different message is quintessential viewpoint discrimination in violation of the First Amendment. *See* Part II.

The government is likewise incorrect that the Solomon Amendment merely earmarks federal funds for particular purposes. To the contrary, as currently applied, it penalizes the entire university if any "subelement" deviates from the government's demands—without regard to whether the subelement itself receives federal funding. The government thus uses funding leverage to coerce universities to abandon protected speech in areas wholly *un*related to its exercise of its spending power.

This feature of the Solomon Amendment ignores the well-settled law of unconstitutional conditions. Under this Court's precedents, a funding condition violates the First Amendment when aimed at expression wholly unrelated to the purposes for which funding is given. Government may not place a speech-restrictive "condition on the *recipient* of a subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected

conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis in original). That, of course, is precisely what the Solomon Amendment does.

Like the "equal-access" provision, this "subelement" rule is the product of changes to the original Solomon Amendment to make its consequences for universities ever more draconian. As originally applied, the Solomon Amendment limited any loss of funding to Defense Department funds, and to the particular "subelement" of the university found not in compliance. Thus, if a law school denied access to military recruiters, then only the law school, not the entire university, would lose funding. The Solomon Amendment has since been extended to cover funds from the Departments of Labor, Health and Human Services, Education and Homeland Security, and to provide that a violation by any part of the university triggers a loss of federal funding for the university as a whole.

Like the "equal-access" provision, the "subelement" rule's indiscriminate reach into every laboratory, library and lecture hall across campus is unnecessary to serve the government's purposes. The government provides no funds for career services activities, and military recruiting at law schools is unrelated to the reasons the National Institutes of Health provide scientists funding for infectious disease research or the Education Department provides teachers in training subsidies for bilingual education. Law schools that receive no federal money are organizationally and financially separable from other subelements of the university that do. Thus the Solomon Amendment unnecessarily exceeds the legitimate scope of the government's spending discretion to earmark funds for particular purposes. By pitting subelements within the university against each other, it also intrudes into university self-governance protected by academic freedom. The sweeping scope of the Solomon Amendment's sube-

lement rule is an independent ground for its invalidation under the First Amendment. *See* Part III.

These arguments do not raise constitutional doubt about the conditions imposed by Title VI and Title IX of the Civil Rights Act, which require universities that receive federal funds to forego race or sex discrimination throughout all their educational programs. The conditions attached to federal funding by the Solomon Amendment are imposed for the purpose of suppressing the expression and academic freedom of university faculties, but this is not true of Titles VI and IX. The conditions imposed by the Solomon Amendment are unrelated to the subject matter of the federal research funding that they place in jeopardy, but the conditions that Titles VI and IX impose, eliminating support for race or sex discrimination, bear a substantial logical nexus to each and every educational program throughout the university. Finally, the history of the Solomon Amendment shows that the military was able to recruit law students to its ranks without such drastic requirements as "equal access," but the long history of the government's efforts to eradicate discrimination based on race and sex shows that extraordinary prophylactic measures continue to serve a compelling need.

The Solomon Amendment thus violates freedom of speech and core principles of academic freedom protected by the First Amendment. The Third Circuit's judgment should be affirmed.

ARGUMENT

At issue in this case is the constitutionality of the Solomon Amendment, a federal statute providing that federal funds may not "be provided to an institution of higher education (including any subelement of such institution)" if that institution "has a policy or practice" that prevents military employers "from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting." 10 U.S.C. § 983(b) (2005). This law violates the First

Amendment and, in particular, the academic freedom this Court has long respected as a key aspect of freedom of speech.

As detailed below in Part I, the Solomon Amendment violates well-settled principles of academic freedom by displacing faculty judgment in core areas of academic expertise. Part II shows how the Solomon Amendment, as applied to require equal rather than adequate access for military recruiters, has the impermissible purpose of suppressing faculties' viewpoint. Part III shows how the Solomon Amendment, as applied to withdraw funds from the entire university for the speech of a single school—even if that school receives no federal funds—amounts to an unconstitutional penalty rather than a permissible exercise of the spending power. For these reasons, the Solomon Amendment as currently applied violates the First Amendment.

I. THE SOLOMON AMENDMENT INTERFERES WITH ACADEMIC FREEDOM BY DISPLACING FACULTY JUDGMENT IN CORE AREAS OF ACADEMIC POLICY AND EXPERTISE.

If the federal government had required as a condition of federal funding that university faculties allow army officers to accompany professors to the lectern in order to provide the government's perspective to students in class, there would be no doubt that the condition raised serious questions of academic freedom. Academic freedom likewise would be obviously implicated if the government had required a military co-author to be included in every published book or article resulting from scholars' university research.

The fact that this case involves the forced inclusion of military recruiters in universities' programs to place students in postgraduate employment does not diminish these First Amendment concerns. Academic freedom extends to faculty decision-making beyond teaching and research construed narrowly.

Academic freedom extends also to admissions, extracurricular activities, evaluation criteria, and the academic values that universities seek to impart to their students throughout the educational environment. The Solomon Amendment improperly displaces academic freedom in this larger sense.

A. Academic Freedom Extends to Faculty Policies Prohibiting Discrimination Against Students in Postgraduate Employment.

The Solomon Amendment interferes with decisions by the nation's law schools, beginning in the late 1970s, to extend their existing nondiscrimination policies to include the criterion of sexual orientation. JA 69-71, 150-152. These policies were adopted through faculty meetings, debates and official votes, all core aspects of academic self-governance. JA 69-71, 150-152. These policies now ban discrimination on the basis of race, national origin, gender, religion, age, disability, veteran status—and sexual orientation. JA 18, 32-34, 56, 71, 136, 151, 179, 211. As one aspect of these policies, law schools offer their official career services programs only to employers that ban discrimination on these grounds. Such policies reflect the academic judgment of law school faculties that nondiscrimination is an essential professional value that should be taken seriously in the future career choices of their students. It also reflects their academic judgment that employment, like grades on exams or essays, should be distributed on the basis of individual effort and merit rather than on any "basis not demonstrably related to the job function involved." AAUP, *On Discrimination*, *supra*, at 185.

This Court has long acknowledged that academic freedom is a "special concern of the First Amendment," even if it is "not a specifically enumerated constitutional right." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., concurring). "[U]niversities occupy a special niche in our constitutional tradition," *Grutter v. Bollinger*,

539 U.S. 306, 329 (2003), and "a traditional sphere of free expression," *Rust v. Sullivan*, 500 U.S. 173, 200 (1991), that is worthy of profound respect. "[I]n the University setting, . . . the [government] acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

Academic freedom is not just a right of professors; it has a "transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Bd. of Regents of the Univ. of New York*, 385 U.S. 589, 603 (1967). The "essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In short, academic freedom is "fundamental to the functioning of our society." *Rust*, 500 U.S. at 200.

The application of these principles to this case would be obvious if the Solomon Amendment had directly targeted university teaching or scholarship. Academic freedom "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Sweezy*, 354 U.S. at 250; *see also Epperson v. Arkansas*, 393 U.S. 97, 104–05 (1968). As Justice Powell wrote in *Bakke*, relying on Justice Frankfurter's famous concurrence in *Sweezy*: "It is the business of the university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Bakke*, 438 U.S. at 312 (Powell, J., concurring) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)).

Academic freedom has long been deemed to extend beyond teaching and research. It is settled that it extends to university admissions. *See Sweezy*, 354 U.S. at 262–63 (Frank-

furter, J., concurring) (including among the four freedoms of the university the freedom "'to determine for itself on academic grounds . . . who may be admitted to study'") (quoting *The Open Universities in South Africa* 10-12)); *Grutter*, 539 U.S. at 328–29 (deferring to the University of Michigan Law School faculty's "educational judgment that [racial] diversity [in admissions] is essential to its educational mission").

Academic freedom also extends to faculty coordination of extracurricular student activities. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231-32 (2000) (declining to distinguish extracurricular student activities along lines of relevance to the university's mission of "stimulat[ing] the whole universe of speech and ideas": "It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.").

Academic freedom likewise extends to university governance on matters of educational policy, structure and environment. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 & n.12 (1985) (stating that academic freedom "thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself" (quoting *Keyishian*, 385 U.S. at 603)); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 199 (1990) (acknowledging "the importance of avoiding second-guessing of legitimate academic judgments" and reiterating that "'judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment'" (citation omitted)).[2]

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[2] *See also* 1966 *Statement on Government of Colleges and Universities*, AAUP POLICY DOCUMENTS, *supra*, at 221 (providing that faculty have "primary responsibility" for educational policy decisions, including "those aspects of student life which relate to the educational process"); AAUP, *Faculty Governance*, *supra*, at 224, 225 & 227.

It follows that academic freedom also protects faculty policies that set forth criteria for advancing students into postgraduate employment and seek to instill educational values that students will carry with them into that employment. Preparing students for future employment is, after all, the ultimate function of the university in our society. This Court's opinion in *Grutter* went so far as to emphasize the career placement aspect of higher education as a ground for upholding racial diversity in admissions: "We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship. . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 331–32.

No less than curricular, extracurricular or admissions policies, nondiscrimination policies also reflect the exercise of faculties' academic expertise. Academic freedom plainly includes the tasks of evaluating and rewarding student performance. In *Ewing*, the Court held that "'[u]niversity faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.'" 474 U.S. at 225 n.11 (quoting *Bd. of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring)). Just as a faculty may determine as a matter of educational policy to award grades based on students' merit, so it may determine that merit shall be the touchstone of a school's career development program. A faculty is entitled to make the academic judgment that assisting recruitment by an employer that refuses to hire openly gay students is akin to failing a student in class merely for being gay.

This connection between academic expertise and nondiscrimination policy is especially strong in law schools, where legal education turns as much on modeling professional values as it does on formal classroom training. As this Court

has stated: "[A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950); *see Grutter*, 539 U.S. at 332 (noting that "universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders" (citing *Sweatt*)). "'[T]he law and lawyers are what the law schools make them.'" Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 34 n.1 (1992) (quoting a May 13, 1927 letter from then-Professor Felix Frankfurter). Career planning and placement services thus are part of law schools' "hidden curriculum," which may well affect law students' professional attitudes more than the "formal curriculum" ever does. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. Legal Educ. 247, 253 (1978).

Nondiscrimination policies in employment also attempt to instill the standards of professional conduct that law school graduates must follow upon entering the legal profession. The rules adopted by the highest courts of many states provide that it is professional misconduct for a lawyer to discriminate in employment on the basis of sexual orientation.[3] The codes of judicial conduct of more than thirty states prohibit judges from manifesting bias or prejudice based on sexual orientation.[4]

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[3] *See, e.g.*, Cal. R. Prof'l Conduct 2-400 (B); D.C. R. Prof'l Conduct 9.1; Ill. R. Prof'l Conduct 8.4(a)(9)(A); 22 N.Y. Comp. Codes R. & Regs. § 1200.3 (a)(6)(DR 1-102); Ohio Code Prof'l Responsibility DR 1-102(B); Vt. R. Prof'l Conduct 8.4(g); Wash. R. Prof'l Conduct 8.4(g).

[4] *See, e.g.*, Fla. Code of Jud. Conduct, Canon 3B(5)-(6); Idaho Code of Jud. Conduct, Canon 2(C); Ill. Code of Jud. Conduct, Canon 3(A)(8); Kan. Code of Jud. Conduct, Canon 3(B)(5); Minn. Code of Jud. Conduct,

For all these reasons, the Solomon Amendment interferes with core aspects of academic freedom—namely, faculties' ability to determine the professional standards and values that they will impart to their students and to utilize the most effective mechanisms for doing so.

B. The Solomon Amendment Interferes with the Academic Freedom of Faculties to Set Policy and Exercise Self-Governance.

Two features of the Solomon Amendment make manifest its interference with these core aspects of academic freedom. As originally applied, the Solomon Amendment merely forbade each unit of the university to exclude military recruiters from that unit as a condition of that unit's receipt of Defense Department funds. Thus, law schools were free to enforce their nondiscrimination policies by excluding military recruiters from their *official* career placement programs while allowing military recruiters to meet with students by other means, and many schools readily did so. *See* JA 59–60, 154–156, 180–181.

By 2001, however, the Defense Department had made the funding strictures on universities more draconian in two respects. First, it adopted a policy of *equal* access to campuses and students for military recruitment, rather than simply adequate access. In 2004, this new administrative requirement was codified by Congress, so that the Solomon Amendment now requires that the military have access "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer. . . ." 10 U.S.C. § 983(b) (2005).

This reformulation intrudes directly into faculty policy-making. It threatens funding withdrawal even if a law school

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Canon 3(A)(5); Miss. Code of Jud. Conduct, Canon 3(B)(4); Tex. Code of Jud. Conduct, Canon 3(B)(6); Utah Code of Jud. Conduct, Canon 3(B)(5); W. Va. Code of Jud. Conduct, Canon 3(B)(5).

does allow military recruiters access to its campus and students—for example, by furnishing the military with student names and transcripts and inviting military representatives to meet with students in classrooms or nearby facilities—if the government deems that access insufficiently similar to the access given other employers who do not discriminate. There is no showing in the record, however, that such alternative arrangements led military recruitment efforts to suffer before the government's 2001 change in its university access policy.

Second, from 2001 forward, the government vastly extended the scope of the Solomon Amendment to academic programs throughout the university. It applied conditions not only to Defense Department funds but also to all university funds from the Departments of Labor, Health and Human Services, Education and the departments later merged into the Department of Homeland Security, 10 U.S.C. § 983(d)(1). The government also began to interpret the Solomon Amendment to provide that a violation by any part of the university would trigger a loss of federal funding for the university as a whole. A single unit's nonconformity with the condition now jeopardizes federally funded research campuswide.

The effect of this "subelement" rule has been coercive: universities have uniformly sacrificed their law schools' nondiscrimination policies in order to retain vast sums for scientific and other research in other schools and departments. The subelement rule also compounds the violation to law schools' academic freedom; it intrudes upon the university's academic freedom to determine how its schools and departments relate to one another as a matter of internal governance.

II. BY REQUIRING "EQUAL" RATHER THAN ADEQUATE ACCESS FOR MILITARY RECRUITMENT, THE SOLOMON AMENDMENT IMPROPERLY AIMS AT SUPPRESSING ACADEMIC EXPRESSION BASED ON ITS MESSAGE.

Because faculty policies declaring sexual orientation irrelevant to academic merit constitute expression at the core of academic freedom, the government may not target that expression "because of its message [or] its ideas" without the most compelling justification. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). A content-based regulation aimed at viewpoint is presumptively invalid. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992); *Texas v. Johnson*, 491 U.S. 397, 416 (1989). For the following reasons, the Solomon Amendment as currently interpreted and applied should be found to constitute impermissible viewpoint discrimination.

A. The Equal-Access Requirement Serves No Purpose Other Than Viewpoint Discrimination.

The legislative history of the Solomon Amendment provides ample evidence that it was originally enacted with the purpose of punishing faculties who declined to enforce the military's discriminatory policies within their campus placement programs. For example, Representative Richard Pombo urged Congress to support the Solomon Amendment to "send a *message* over the wall of the ivory tower of higher education" by conveying to "colleges and universities . . . that their starry-eyed idealism comes with a price." 140 Cong. Rec. H3863 (emphasis added).

Such singling out of speakers for their viewpoint is the most "blatant" form of free speech violation. *Rosenberger v. Rector & Visitors*, 515 U.S. at 828. Retaliatory legislative motivation alone is sufficient to discredit a law as impermissibly viewpoint-based. *See, e.g., Minneapolis Star &*

Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 579–80 (1983) (describing this Court's decision in *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936), which invalidated a tax singling out newspapers that had "'ganged up' on Senator Huey Long," as "attributable in part to the perception on the part of the Court that the state imposed the tax with an intent to penalize a selected group of newspapers").

But even if the censorial *motive* of legislators who enacted the Solomon Amendment were ignored, *cf. United States v. O'Brien*, 391 U.S. 367, 384 (1968), the current *text and structure* of the Solomon Amendment make clear that it is aimed at faculty viewpoint. The government claims that the law aims simply at the instrumental, non-expressive goal of gaining access to campuses to recruit students to military service. But the switch from an access requirement to an *equal*-access requirement belies that claim.

Before 2001, military recruiters were able to reach potential student candidates for military service through a variety of means other than access "equal in quality and scope" to that provided to employers who do not discriminate. There is no evidence that such alternative access was ineffective. Indeed, the military even expressed gratitude to those schools that made efforts to accommodate military recruiters' access to students by means other than their official career service programs. *See* JA 60, 169-170.

The demand for *equal* access thus serves no functional purpose. It cannot be justified by the content-neutral goal of facilitating military recruitment, but amounts to a simple insistence on symbolism. As military recruiters candidly revealed, differential access, no matter how effective, in their view "sends the *message* that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organization[s]" included in official career services programs. JA 132 (emphasis added). This suggests that the military enforces the equal-access

policy not to recruit soldiers but to supplant law school faculties' message with a message of the government's own.

To suppress "the specific motivating ideology or the opinion or perspective" of law school faculties in this way is quintessential viewpoint discrimination. *Rosenberger*, 515 U.S. at 829 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). The government may not interfere with faculties' academic policy based on its dislike of anticipated listener reaction to the message. *Cf. Johnson*, 491 U.S. at 410 (invalidating as impermissibly viewpoint-based a flag desecration statute defended on the basis of the government's concern that "such conduct will lead people to believe . . . that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts"); *see Boos v. Barry*, 485 U.S. 312 (1988) (invalidating a statute prohibiting the display of signs outside a foreign embassy so as to bring the foreign government into "public odium" or "public disrepute"); *Schacht v. United States*, 398 U.S. 58 (1970) (invalidating a federal statute forbidding the portrayal of armed forces uniforms in a manner tending to discredit the armed forces).

The analysis is no different if the military is understood to compel faculty speech rather than to forbid it. Viewed this way, the Solomon Amendment conscripts law school faculties into uttering a message contrary to their own academic nondiscrimination policies: namely, that military employment *is* honorable and desirable, even though military employers discriminate on the basis of sexual orientation. Such government compulsion to disseminate a message a faculty believes should not be disseminated "exacts a penalty on the basis of . . . content." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); *see W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995). The injury is compounded by the government's insistence on occupying particular physical space at law

schools rather than the alternative space offered in nearby locations. *Cf. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986) (sustaining a compelled speech challenge to a requirement that a utility devote space in its billing envelopes to the counterspeech of environmental groups).

Nor is the analysis any different if the Solomon Amendment is understood as compelling unwanted association rather than unwelcome speech. Faculties engage in expressive activity when they convene in an "association that seeks to transmit . . . a system of values," *Boy Scouts of America v. Dale*, 530 U.S. 640, 649-50 (2000), and the government may not force them to include military recruiters in that association if that would impair their ability to transmit those values. The forced participation of military recruiters in officially sponsored career programs impairs faculties' expression by "send[ing] a message" that law schools accept discrimination against gay students "as a legitimate form of behavior." *Id.* at 653.

Hence the government's analogy to the free association claim rejected in *Grove City College v. Bell*, 465 U.S. 555 (1984), is misplaced. *See* Pet. Br. 24-25. In *Grove City*, the government sought to advance a generally applicable interest in combating discrimination against women. Here, by contrast, the government's stated interest is in suppressing the message adopted by faculties in their exercise of academic freedom. No "ideology or philosophy" requiring the subordination of women was seriously advanced as a ground for objection to the government's funding conditions in *Grove City*. The ground for requiring association there was content-neutral. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984) (upholding the application of a state antidiscrimination law to an all-male social club where the Jaycees lacked "ideologies or philosophies" requiring the exclusion of women). The government here, by contrast, aims at the *expressive* aspect of association between law school faculties and military recruiters—*i.e.*, the message that equal

or differential access sends to observers. In any event, it has long been settled in national debate that sexism, like racism, is not an expressive ground for disassociation that government is required to respect. *See, e.g., id.* at 628; *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

Nor are career services programs akin to a "public forum" in which military recruiters do not implicate the law school's own academic values, as the government and its *amici* incorrectly assert, *see* Pet. Br. 27, 31–32; *Amicus Curiae* Brief of the Judge Advocates Ass'n in Support of Petitioner, at 21; Brief of Boy Scouts of America as *Amicus Curiae* in Support of Petitioners, at 2 & 13–18. Such programs are not open fairs for any speaker on a first-come-first-served basis, but instead involve official sponsorship of speech that is carefully selected and monitored by a law school faculty and staff. *Cf. Perry Educ. Ass'n*, 460 U.S. at 44, 47 (declining to find teachers' mailboxes a public forum). Thus, "whether or not they occur in a traditional classroom setting," career services programs are akin to curricular activities where educators may impose limitations "reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271, 273 (1988) (high school student newspaper). In such a setting, the likelihood of misattribution of employers' discriminatory messages to the law school itself is considerable. *See* JA 163–164.

B. Viewpoint Discrimination is Impermissible in Conditions on Funding.

Even "in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'" *NEA v. Finley*, 524 U.S. 569, 587 (1998) (quoting *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 550 (1983)). Thus "'ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts.'" *Rosenberger*, 515 U.S at 830 (citation omitted). This principle has been established for at

least half a century, *see Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating a law giving tax exemptions only to those veterans who swore a loyalty oath), as the government concedes, *see* Pet. Br. at 41.

In recent illustrations of this principle, the Supreme Court has struck down funding restrictions that, like the Solomon Amendment, discriminated on the basis of viewpoint. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), this Court invalidated a denial of federal funds to any organization representing indigent clients in "an effort to amend or otherwise challenge" the existing state or federal welfare system, *see id.* at 537, holding that Congress may not "define the scope of the litigation it funds to exclude certain vital theories and ideas," *id.* at 548. Similarly, in *Rosenberger*, this Court struck down a denial of state university funds to a student-run newspaper espousing a Christian evangelical perspective, holding that the government may not select "for disfavored treatment those student journalistic efforts with religious editorial viewpoints." 515 U.S. at 831.

The conditions that the government seeks to place upon federal funding in this case are similarly invalid. Here, as in *Velazquez*, Congress may not use the withdrawal of funds as leverage to suppress faculties' viewpoint. And here, as in *Velazquez* and *Rosenberger*, the government may not control "an existing medium of expression" such as a career placement program "in ways which distort [that program's] usual functioning." *Velazquez*, 531 U.S. at 543.

III. BY WITHDRAWING FEDERAL FUNDING FROM AN ENTIRE UNIVERSITY, THE SOLOMON AMENDMENT UNCONSTITUTIONALLY PENALIZES PROTECTED SPEECH.

The government asserts that the impermissibility of viewpoint discrimination is the *only* First Amendment limit on the power of Congress to impose spending conditions, and that, "[o]therwise, the recourse for a person who does not wish to

be bound by a funding condition is to decline federal assistance." Pet. Br. at 41. This remarkable statement is incorrect. At one time, some Justices might have given the government such a free hand in allocating its own largesse. *See, e.g., McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892) (Holmes, J.) ("The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman."). But this Court's modern precedents have long abandoned such an approach. Today, while the government may decline to subsidize speech with which it disagrees, it may not use the leverage of funding to pressure recipients to surrender speech lying wholly outside the contours of the funded program.

The Solomon Amendment as currently interpreted does just that, penalizing speech wholly nongermane to the subject matter of government subsidies to universities. It threatens to withdraw a breathtaking range of federal funds from university research and teaching that has no relation whatsoever to law school policies on military recruitment. Moreover, it allows universities no option to treat their law schools, which receive no federal funding, separately from other units of the university that do receive federal funding. For these reasons, the Solomon Amendment violates the First Amendment even if it is held not to discriminate based on viewpoint.

A. The Solomon Amendment Aims At Speech Unrelated to the Subject Matter of Federally Funded Programs.

Federal funding has been vital to the excellence of the research and teaching carried out at the nation's universities. But the Solomon Amendment imposes conditions on speech that has no nexus or relationship to the purpose of that federal funding.

1. *Federal Funding is Vital to the Nation's Universities.*

Post-secondary institutions depend heavily on federal funding to support their annual expenditures. In Fiscal Year ("FY") 2003, for example, such institutions received an estimated $57.5 billion in federal funds, which accounted for 19.2 *per cent* of their expenditures. William C. Sonnenberg, *Federal Support for Education FY 1980 to FY 2003* (NCES 2004–026), U.S. Dep't of Education: National Center for Education Statistics, at 15, 21 (2004), *available at* http://nces.ed.gov/pubs2004/2004026.pdf (last visited Sept. 17, 2005). In FY 2003, post-secondary education institutions received the largest share of federal support for education. *See id.* at 15. Post-secondary institutions received *all* of the $29.2 billion in federal research funding to education institutions in 2003, *id.* at 10, 15, and over $5 billion in grants for purposes other than research, *id.* at 35-36. Thus, even though federal funding for nearly $23 billion in annual student financial aid is exempt from the Solomon Amendment, *see* 10 U.SC. § 983(d)(2), nearly $35 billion in annual federal support for higher education remains at stake.

Most federal support for research at post-secondary institutions comes from the Department of Health & Human Services, including the National Institutes of Health. *See* Sonnenberg, *Federal Support* at 9. In FY 2003 alone, HHS expended $15.8 billion, or 54 *per cent* of all federal educational support for research. *Id.* Almost all of the research grants provided by the NIH over the past 12 years have gone to post-secondary institutions. *See NIH Support By Kind of Institution, FY 1993-2003: Research Grants, available at* http://grants.nih.gov/grants/award/trends/instchar03rg.htm (last visited Sept. 17, 2005).

2. *The Solomon Amendment Affects a Vast Range of Academic Research Unrelated to Defense or Military Recruiting Purposes.*

The federal funds affected by the Solomon Amendment support university teaching and research in a vast range of subject areas, *see* 10 U.S.C. § 983(d); 32 C.F.R. § 216.2 (listing funding from the Departments of Labor, Health & Human Services, Education, Homeland Security, and "Related Agencies," such as the Corporation for National and Community Service, the Corporation for Public Broadcasting, and the National Commission on Libraries and Information Science), but none of these subject areas relates to military recruiting. *See generally Catalog of Federal Domestic Assistance*, *available at* http://12.46.245.173/cfda/cfda.html (last visited Sept. 18, 2005) (listing all federal assistance programs available to institutions). In fact, only a small percentage of federal funding provided to universities is related to any military purpose at all. *See* Sonnenberg, *Federal Support*, at 35–36, 38. In FY 2003, the Department of Defense provided only $2.2 billion, or 7 *per cent*, of all federal research support to post-secondary institutions. *Id.* at 9.

Most funds covered by the Solomon Amendment are provided to support research and development, including vital medical research on infectious diseases, neuroscience and neurological disorders, heart and vascular diseases, mental health, aging, diabetes and endocrinology, immunology, lung diseases, the human genome, HIV/AIDS, and the causes, prevention, detection, diagnosis, treatment and biology of cancer. *See, e.g.*, *Catalog of Federal Domestic Assistance*, *available at* http://12.46.245.173/cfda/cfda.html; *NIH Awards to Domestic Institutions of Higher Education, By Rank FY 2004*, *available at* http://grants.nih.gov/grants/award/trends/dheallinst04.htm (last visited Sept. 18, 2005).

In addition to federal grants for medical and scientific research, the Solomon Amendment affects federal grants and contracts for subjects from training future doctors and nurses

to training future elementary school teachers on how to work with students with disabilities and students who face language barriers. *See, e.g., USC Sponsored Project Activity—Active Awards as of Sept. 1, 2005, available at* http://www.usc.edu/dept/contracts/stats/PI.ACT040804.txt (last visited Sept. 18, 2005).

3. *Law Schools Receive Few, If Any, Federal Funds Affected by the Solomon Amendment.*

While the nation's universities depend heavily on federal funding for research and support affected by the Solomon Amendment, their affiliated law schools receive virtually no federal funding covered by that law. The vast majority of federal funds tha benefit the nation's law schools consists of funds for student financial assistance, which are explicitly exempt from the conditions imposed by the Solomon Amendment. *See* Dep't of Defense Appropriations Act of 2000 § 8120, Pub. L. No. 106-79, 113 Stat. 1212, 1260 (1999); 10 U.S.C. § 983(d)(2); JA 147 ("The Law School does not receive significant federal funding. . . . The University, however, annually receives approximately $328 million from the federal government, which comprises approximately 16% of its operating budget.") (quoting Robert C. Clark, former Dean of Harvard Law School); JA 84-85 (noting that while Yale University receives $300 million in federal funds annually, Yale Law School receives little, if any, federal funding); *see also Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 174-75 (D. Conn. 2005).[5]

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[5] The patterns are the same at other major research universities. For example, Stanford University ranks fourth among the nation's 120 degree-granting institutions receiving funds from the federal government. *See Digest of Education Statistics, 2003*, Table 344, U.S. Dep't of Educ., Nat'l Center for Educ. Statistics, *available at* http://nces.ed.gov/programs/digest/d03/tables/dt344.asp (last visited Sept. 17, 2005). While Stanford University receives over $600 million in federal funds annually, *id.*, Stanford Law School has received no federal funding apart from

B. Aiming At Speech Outside the Scope of Federally Funded Programs Imposes An Unconstitutional Penalty.

"[W]hen the government appropriates public funds to establish a *program* it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194 (emphasis added). Thus, for example, if the government offered funding to law schools for their career services programs, it might set terms or conditions for its use. But as *Rust* also made clear, the government may *not* place a speech-restrictive "condition on the *recipient* of a subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Id.* at 197 (emphasis in original). This, of course, is exactly what the Solomon Amendment does.

This feature of the Solomon Amendment, which arises from its current application to require that any subelement's violation triggers a loss of funding to the entire university as a whole, is an impermissible form of government overreaching in violation of the First Amendment. Such overreaching is especially inappropriate here, because, as *Rust* reiterated, "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditures of Government funds is restricted" by basic First Amendment principles. *Id.* at 200.

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student financial aid in the past four years. Stanford University, *Sponsored Projects Report (FY 2004)*. Likewise, while the University of Southern California receives over $350 million annually in federal money, *see Digest of Education Statistics, 2003*, Table 344, few, if any of these funds go to USC Law School. *See generally Distribution of Awards From Funding Sources to USC Academic Revenue Centers—FY2004*, http://www.usc.edu/dept/contracts/graphs.html (last visited Sept. 18, 2005).

This Court has long held that the government may not use the leverage of a federally funded program to suppress protected speech outside that program. In *Regan v. Taxation With Representation of Washington ("TWR")*, 461 U.S. 540 (1983), for example, this Court held that Congress need not subsidize the lobbying activities of charitable organizations by allowing them tax-deductible contributions to support their lobbying. Critical to the Court's holding, however, was that these organizations remained free "to receive [tax-deductible] contributions to support . . . nonlobbying activit[ies]" through their organizational affiliates. *Id.* at 545; *see id.* at 553 (Blackmun, J., concurring).

In *FCC v. League of Women Voters ("LWV")*, 468 U.S. 364, 400 (1984), by contrast, the Court invalidated a law withholding federal funds from public radio and television stations that engaged in editorial broadcasts. As distinct from the tax provisions upheld in *TWR*, the Court emphasized, the government here had impermissibly allowed a broadcast station "no way of limiting the use of its federal funds to all noneditorializing activities" while pursuing its editorializing activities through the use of other funds, such as the donations of private listeners. *LWV*, 468 U.S. at 400. Thus, although Congress need not use its own funds to support speech it disapproves, it may not withdraw funding from recipients merely because they use other *nonfederal* funds to engage in disapproved speech. Like *LWV*, *Rust* emphasized the crucial distinction between setting the terms of a government *grant* and limiting all speech engaged in by the *grantee*. *See Rust*, 500 U.S. at 197; *see also* Brief for the United States, *Rust v. Sullivan*, No. 89-139, at 20-24.

This contrast between permissible nonsubsidies and impermissible penalties is not limited to speech, but is a common feature of this Court's protection of individual liberties from government overreaching. For example, the government is free to decline to pay for abortions, but it is not free to deny food stamps or Medicaid payments for foot

surgery because an otherwise eligible recipient has had an abortion. *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980); *Maher v. Roe*, 432 U.S. 464, 474 n.8 (1977) ("If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, . . . strict scrutiny might be appropriate under [a] penalty analysis. . . .").

This Court has likewise imposed in the takings context a requirement of nexus between the purpose of a government benefit and any condition the government might attach to it. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), for example, the Court held it impermissible for a state to require that property owners seeking a permit to enlarge their beachfront house grant the public a permanent easement of access to walk across their property to the sea—even though it would have been permissible to require them to "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836. The Court explained: "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion." *Id.* at 837 (citations omitted).

The Solomon Amendment works a similar "out-and-out plan of extortion" through the sweeping scope of its funding cutoff. On-campus military recruiting cannot be deemed germane within the meaning of *Rust* or *Nollan* to the academic research purposes for which the affected funds were granted. All of the medical and scientific research outside law schools that is targeted by the Solomon Amendment is of course independently protected by the constitutional right of academic freedom.

Moreover, here, as in *LWV*, the Solomon Amendment's threat of a university-wide funding cutoff if any "subelement" of the university inhibits military recruiting makes it impossible for the recipient of government funds "to

segregate its activities according to the source of its funding." 468 U.S. at 400. This makes little sense, for the government can easily reach law school funding without implicating other educational units of the university. Law schools are typically physically separate from other parts of their university and their budgets can be easily separated. Thus it would be a simple matter for a university, like the family planning clinics in *Rust*, to segregate all government funds for research from the unrelated expression that Congress finds objectionable.

Nothing in this argument raises constitutional doubts about Title VI or Title IX of the Civil Rights Act of 1964, under which the federal government conditions universities' receipt of funds on their agreement to enforce prohibitions of discrimination on the basis of race, color, national origin and gender. *See* 42 U.S.C. § 2000d; 20 U.S.C. § 1681(a). To be sure, when Congress overrode this Court's decision in *Grove City College v. Bell* by statutory amendment, the funding conditions of Titles VI and IX were extended to the entire college or university when any part of it receives federal assistance. *See* 20 U.S.C. § 1687.

The conditions imposed by the Solomon Amendment, however, are entirely distinct from those imposed by Titles VI and IX for several reasons. First, the conditions imposed by the Solomon Amendment are imposed for the purpose of suppressing the expression and academic freedom of university faculties, and this is not true of Titles VI and IX. *See* Part I above.

Second, the conditions imposed by the Solomon Amendment are unrelated to the subject matter of the federal research funding that they place in jeopardy. The conditions that Titles VI and IX impose, by contrast, satisfy any substantial nexus requirement, because in these statutes the government's interest is that race or sex discrimination be eliminated from each and every educational program throughout the university.

Finally, Congress has a compelling interest in preventing tax dollars provided by all taxpayers, from being provided to entities that would discriminate against taxpayers themselves on irrelevant grounds. As this Court has held in the different context of determining the scope of congressional authority, the long history of the government's efforts to eradicate discrimination based upon race and sex has justified the need for extraordinary prophylactic measures. *See, e.g., Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28, 730 (2003) (sex); *see id.* at 737-38 (race). In the context of the Solomon Amendment, Congress faced a different history. The military had been able to fulfill its proper instrumental goal of recruiting law students to its ranks. There was no need to deploy the drastic penalties used by the Solomon Amendment as any sort of prophylactic measure that would justify such a gross intrusion into universities' academic freedom and ordering of their internal affairs.

CONCLUSION

For these reasons, the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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